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# IN THE SUPREME COURT OF THE UNITED STATES

NO.
OCTOBER TERM, 1979

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ROBERT A. GRIMES, JR.,
*Petitioner*

-VS-

UNITED STATES OF AMERICA

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 6TH CIRCUIT

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LEITSON, DEAN, DEAN, SEGAR & HART, P.C.
*Attorneys for Petitioner*
By: Robert L. Segar
1616 Genesee Towers
Flint, Michigan 48502

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AMERICAN PRINTING COMPANY
125 WEALTHY STREET, S.E., GRAND RAPIDS, MICHIGAN 49503 — (616) 458-5326
1200 WEST FORT STREET, DETROIT, MICHIGAN 48226 — (313) 963-9310

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 6TH CIRCUIT

Robert A. Grimes, Jr., Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the 6th Circuit entered in the above entitled cause on June 21, 1979.

## OPINION BELOW

The opinions of the Court of Appeals for the 6th Circuit and the United States District Court for the Eastern District of Michigan, Southern Division, are not yet reported. The opinions of those Courts are appended hereto as Appendices A and B, respectively.

## JURISDICTION

The judgment of the Court of Appeals for the 6th Circuit was entered on June 21, 1979. This Court's jurisdiction to review that judgment is conferred by Title 28, *United States Code*, Section 1254(1).

## QUESTIONS PRESENTED

I.

Did the postal service exceed its rule making power in passing the "mail cover" regulation; and did use of evidence thus obtained violate Petitioner's Fourth Amendment rights?

II.

Were Petitioner's rights violated by allowing a Government witness to relate the results of his criminal tax investigation of a third person—then deceased—when such testimony necessarily resulted in admission of hearsay testimony?

III.

Does Federal Rule of Evidence 703, properly interpreted, allow an expert witness to relate a fact to the jury of which he has no personal knowledge and which is not a matter of opinion, or does such evidence constitute inadmissible hearsay?

IV.

Was reversible error committed when Government counsel deliberately asked a question of the son of Appellant, when he knew or should have known that he would plead his constitutional privilege against self-incrimination?



## FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS AND FEDERAL RULES INVOLVED

The pertinent text of the Federal Constitution, Statutory and Regulatory provisions, and the Federal Rules involved is set forth in Appendix B attached hereto. The citations to said provisions are as follows:

United States Constitution
- Fourth Amendment

United States Code Annotated
- Title 39, USCA §101
- Title 39, USCA §401(2)
- Title 39, USCA §404

Federal Regulations
- 39 CFR 233.2

Federal Rules of Evidence
- Rule 703
- Rule 801

## STATEMENT

On July 18, 1978, following a jury trial in the United States District Court for the Eastern District of Michigan (Southern Division), Petitioner was convicted on two counts of tax evasion for the years 1971 and 1972, in violation of Section 7201 of the Internal Revenue Code of 1954 (26 U.S.C.). He was sentenced on September 19, 1978, to two concurrent terms of 30 days' imprisonment and fined $5,000 on each of the two counts. On October 10, 1978, the District Court entered an order denying appellant's motion for a new trial; and on June 21, 1979, the Court of Appeals for the Sixth Circuit affirmed his convictions.

Appellant is an attorney who, except for military service during World War II and the Korean War, has been engaged in the practice of law in Flint, Michigan, since his graduation from the University of Michigan Law School in 1949. He is a sole practitioner with a general practice consisting primarily of negligence and personal injury actions, probate, and domestic relations work. (Tr. 1745)

After an investigation lasting several years and subsequent to indictment, the Government presented evidence at trial which demonstrated a substantial increase in the net worth of Petitioner during the years 1971 and 1972; and claimed that such increase plus personal expenditures indicated a significant understatement of taxable income in Petitioner's federal tax returns for those two years.

Petitioner's defense was that any increase in net worth and expenditures and unreported income was explainable through clerical error, deductions taken erroneously but in good faith by Petitioner, and from non-taxable receipts—mainly loans and loan repayments to him.

During the course of the investigation, the Government twice placed a so-called "mail cover" on Petitioner's home and business addresses. This procedure was carried out by



the Postal Service at the request of the Special Internal Revenue Agent investigating the case. Petitioner unsuccessfully attacked the validity of the mail cover procedure both by motion to suppress at trial and on appeal.

One of the deductions claimed by Petitioner on his tax returns for the years in question and claimed by the Government to be invalid was for rent paid to Petitioner's children for his office building. Petitioner had purchased the building some years before and entered into a lease arrangement with his children (including the trustee of a trust for one of his children). The Government attacked both the bona fides of the transaction, as well as the amount of the deduction. Prior to trial the special agent spoke to Fred Grimes, the oldest son of Petitioner on two occasions. The second time the son was represented by counsel and a tape was made of the interview. At that time Fred Grimes pled his privilege against self-incrimination to a majority of the questions asked and specifically to the question of whether or not he had received any rent payments from his father.

At the trial, Government counsel put exactly the same question to Petitioner's son, who was represented by separate counsel in the court room. He once again asserted his Fifth Amendment rights. (Tr. 808) Immediately thereafter Petitioner's counsel requested a mistrial on the ground that Government counsel should never have asked a question of one so closely associated with the Defendant knowing that in all likelihood he would plead the Fifth Amendment. (Tr. 811) The motion was denied and the trial judge's ruling was affirmed on appeal.

Another area of controversy involved an amount received by Petitioner from his clients Mr. and Mrs. Ronald Worth. This amount was received at the time of the settlement of the first portion of an accident case involving another non-settling Defendant. Petitioner treated the amount received as an advance against future costs and a loan as a result of an agreement between he and the clients. The Government claimed no such agreement existed.

Petitioner had a typed and executed document to substantiate the transaction, which the Government claimed was false. In order to attempt to prove its contention, the Government subpoenaed the original document from Petitioner, over his objection, for the purpose of having the ink tested. The test results indicated that the ink on all of the signatures on the document, except that of Petitioner, was available at the time the document was dated, namely in 1972. However, the Government expert, Albert Lyter, testified that he identified the ink used in making Petitioner's signature as being from the Bic Company and that it was not available until a few months after the date of the document.

Mr. Lyter's expertise was in ink analysis, but he had no knowledge of when the ink first became available, except through a letter written to him about another case some years earlier from a representative of the Bic Company. (Tr. 1148-49, App. E) The trial judge, after first admitting the letter in evidence over Petitioner's objection, reversed himself and withdrew the letter from the jury, but stated that Mr. Lyter could refer to it as a basis of his testimony. (Tr. 1157-8) Petitioner unsuccessfully objected to this procedure, stating that the letter constituted inadmissible hearsay.

In making its net worth computation, the Government acknowledged that Petitioner, during the year 1970, had loaned one Connie Moody (who was deceased at the time of trial) the approximate amount of $28,000. It obtained this information through an affidavit signed by Petitioner which had been transmitted to Moody at his request during an investigation of Moody's tax affairs some years earlier. The affidavit was admitted in evidence by consent. (Gov. Ex. 64A) At the trial, Petitioner testified that, in fact, at the beginning of the relevant period, there were loans due to him from Moody and a related party in the approximate amount of $55,000 to $60,000, which would have accounted for approximately $30,000 of the difference in net worth claimed by the Government. (Tr. 1796-97)



On rebuttal, over strenuous objection by Petitioner, the special agent, who had investigated Moody as well as Petitioner, was allowed to testify about his earlier criminal investigation of Moody, and, further, that he had found no evidence of any additional loans other than those conceded by the Government as listed in Petitioner's affidavit and which related only to the year 1970. (Tr. 2314) Petitioner strongly objected that the testimony of the special agent had to be based on inadmissible hearsay. The trial judge overruled the objection and further, refused Petitioner's request to see the written portions of the investigation remaining with the special agent. (See App. D)

The trial, which lasted approximately six weeks, was submitted to the jury July 17, 1979, and a verdict of guilty was returned July 18, 1979. The Court of Appeals for the Sixth Circuit affirmed Petitioner's convictions in an opinion filed June 21, 1979, seven days after oral argument on June 14, 1979.

## REASONS FOR GRANTING THE WRIT

This case presents serious questions the resolutions of which will have wide application throughout the country. Perhaps the most significant issue of this appeal involves the validity of the mail cover procedure which is being utilized throughout the country by various governmental law enforcement agencies to obtain evidence or gain information about United States citizens.

To the best of Petitioner's knowledge, no federal court in this country, save the Court of Appeals for the Sixth Circuit in this case, has upheld the mail-cover procedure against the specific contention that Postal Regulations providing for it are not within the rule-making power of the Postal Service.

There is no specific statutory basis for use of the mail cover. The sole authority for this procedure is the Postal

Regulation contained in 39 CFR §233.2.* (See App. C) The only possible legislative source of authority for such a procedure is found in 39 USCA §401(2), which gives the Postal Service the power to make rules and regulations "as it deems necessary to accomplish the objectives of this title".** Petitioner does not believe that the mail-cover procedure, implemented solely to help other law enforcement agencies in matters unrelated to postal offenses can possibly be deemed to be included within such a power. The question here is not whether Congress could have authorized such a procedure but whether, in fact, it has.

A regulatory agency has no power to exceed its statutory authority. It cannot deviate from or go beyond the mandate of Congress. See in this regard *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 US 726, 745 (1973) where this Court stated:

> "But the commission contends that since it is charged with administration of the statutory scheme, its construction of the statute over an extended period should be given great weight. See, e.g., *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944). This proposition may, as a general matter, be conceded, although it must be tempered with *the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate.*
>
> * * *
>
> 'The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed it it has a 'reasonable basis in law.' . . . But the Courts are the final authorities on issues of

* See statement of the general counsel of the Post Office to this effect as quoted in *United States* v. *Choate*, 576 F2d 165 at (1976)

** e.g. see 39 USCA §§101, 401-404, App. C.



> statutory construction. *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 S.Ct. 1035, 1042, 13 L. Ed. 2d and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' " (Emph. add.)

Experience has shown that through use of this procedure the Government can within a fairly short period make up an extremely accurate profile of a person's life style and his friends and acquaintances, as well as his business relationships. Citizens should not be subjected to such surveillance without the clear intention of Congress that it is admissible.

Further, this Court has never expressly dealt with the constitutionality of the mail-cover procedure. Although several lower courts have found the procedure to be valid, there remain serious questions as to whether their decisions are correct. In a recent decision,* later reversed, serious constitutional deficiencies were found in the procedure. The concerns in this area were very well and thoughtfully set forth by Judge Hufstedler in her dissenting opinion in the Ninth Circuit decision of *United States* v. *Choate*, 576 F.2d 165 (1976) cert. denied, 99 S.Ct. 350 (Nov. 7, 1978). As she noted, people using the United States Government Mail, both senders and recipients, have a reasonable expectation of privacy with respect to the material on the outside of the envelope. This disclosure that is voluntarily made by transmission of a letter is for a limited purpose and, of course, no disclosure is made at all by the intended recipient. It is critical to remember that in this situation we are dealing with what is for most purposes a government monopoly and that people have little choice about whether or not to use the facilities of the United States Postal Service. Obviously, in this case, as in the many other instances where a mail cover has been used, no warrant was obtained and the question of reasonableness of the search was never adjudicated. This

* *United States* v. *Choate*, 422 F.Supp. 261 (CAL., 1976)

Court should review the legitimacy of the systematic intrusion by the use of mail covers into the lives of the citizens of this country.

In addition, this case raises significant questions involving interpretation of the hearsay provisions of the Federal Rules of Evidence.* The amount of the loans made by Petitioner to Connie Moody were critical to his defense in explaining the increase in his net worth. The rebuttal testimony of the special agent confronted Petitioner with a situation where statements of a decedent (e.g. Moody had died some time before the trial), other persons and written documents, were used to contradict him without the availability of cross examination and where even the production of the notes of the special agent concerning his investigation was refused.

The decision of the Sixth Circuit in this case upholding the introduction of such evidence is in direct conflict with that of the Fifth Circuit in *U.S.* v. *Brown*, 548 F2d 1194 (C.A. Fla., 1977).

In the *Brown* case an Internal Revenue agent testified that between ninety and ninety-five percent of the returns prepared by the defendant tax preparer, which the agent had audited, contained substantially overstated itemized deductions. The record indicated her knowledge must have come through conversations with the taxpayers audited. The Court ruled the admission of such testimony erroneous because, in effect, she was relying for a statement of fact on out of court statements (e.g. her interviews with the taxpayers whose returns she had audited) which were not matters of her own personal knowledge and which were not available to the defendant for cross examination.

In this case a separate record was made and the special agent acknowledged that in his investigation he had talked to Mr. Moody who stated that he had borrowed no additional

* Rule 801 et seq



monies from Petitoner; and that he also talked to other people and had reviewed a number of written documents. (See App. D) The separate record made clear that his actual testimony before the jury that his investigation had revealed no additional loans from Petitioner to Moody was based on hearsay evidence. (Tr. 2314) Petitioner was obviously unable to refute this in any way. This ruling of the trial court which was affirmed on appeal and which Petitioner believes is in conflict with the *Brown* case, involves a serious question of the interpretation of the Federal Rules of Evidence.

Similarly, the trial court allowed into evidence the testimony of a representative of the Bic Company, who was not present in court, through a letter he had written some years earlier to the Government's expert witness, Albert Lyter. The trial and appellate courts justified this on the basis of Federal Rule of Evidence 703 which allows an expert to rely on items not admissible in evidence in forming his opinion, if it is of the type reasonably relied upon by experts in the particular field.

In this case, however, it is clear that Mr. Lyter, the expert witness, had no opinion whatsoever on when the ink first became available. (Tr. 1148-49, App. E) He was nothing more than a conduit for a plain statement of fact made by Mr. Coppeta of the Bic Company about a matter concerning which Mr. Lyter had no personal knowledge. Petitioner does not believe, despite the obvious intention to broaden the rules of evidence with respect to admissibility, that it was ever the intention of the drafters of the Federal Rules of Evidence to allow admission of such a statement. (See *Bryan* v. *John Bean Division of FMC Corp.*, 566 F.2d 541 (C.A. 5, 1978)) The situation is clearly distinguishable from the sort of situation in which a doctor might rely on nurses' notes to form a medical opinion. In fact, far from being an underlying basis for Mr. Lyter's opinion, Mr. Lyter's identification of the ink was really preliminary to the conclusion of when the ink was first available.

Petitioner believes that guidance should be given by this Court to the many federal trial courts in this country with respect to this very important aspect of Rules of Evidence, their interpretation and application.

Finally, the conduct of Government counsel in asking Petitioner's son, Fre.' Grimes, a question, knowing full well that he would in all likelihood plead the Fifth Amendment (since he had already done so in a prior taped interview) should not be countenanced. (Tr. 808, et seq) Petitioner believes this case is distinguishable from *Namet* v. *United States*, 373 U.S. 179 (1963) relied upon by the Government. In the latter case two of the witnesses involved had already pled guilty (they were co-defendants); and it was quite doubtful as to whether or not they could plead the Fifth Amendment. Further, in *Namet* the court relied on the failure of defense counsel to object to many of the questions involved.

Nevertheless, to the extent that the *Namet* decision would justify the trial court's ruling in this case, Petitioner believes it should be re-examined, because it is critical that the people of this country know that its Government acts fairly in carrying out its various functions and particularly those involving the enforcement of the criminal laws. There is simply no reason why Government counsel should not have cleared this matter up before the Court while the jury was excused in order to avoid the kind of prejudice that could have easily and probably did occur here. This problem is one which occurs often and should be put to rest. See, for example, *Lawrence* v. *Wainwright*, 445 F2d 281 (5th Cir., 1971; *United States* v. *Ritz*, 548 F2d 510 (5th Cir., 1977); *San Fratello* v. *United States*, 340 F2d 560 (5th Cir., 1965); *United States* v. *King*, 461 F2d 53 (8th Cir., 1972), and *United States* v. *Maloney*, 262 F2d 535 (2nd Cir., 1959).



## CONCLUSION

Petitioner believes that this case involves timely and substantial questions of great public importance and further, that the decisions of the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Eastern District of Michigan, Southern Division, should be reversed for the reasons already stated herein.

Respectfully submitted:
LEITSON, DEAN, DEAN, SEGAR & HART, P.C.
*Attorneys for Petitioner*
By: (s) Robert L. Segar

# APPENDIX



## APPENDIX A
## OPINION AND ORDER IN COURT OF APPEALS
FILED June 21, 1979

Before: ENGEL, Circuit Judge and PHILLIPS and PECK, Senior Circuit Judges

An experienced Michigan attorney appeals from a judgment of the district court entered upon a jury verdict of guilty of two separate counts of attempted income tax evasion for the years 1971 and 1972, in violation of Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. §7201.

In his direct appeal Grimes makes ten claims of error which he claims denied him his right to a fair trial and require a reversal and remand for a new trial. Among these claims are an assertion that the government improperly utilized certain information and evidence obtained by mail covers which had been placed upon Grimes' mail from time to time. Grimes claims that the mail cover procedure was violative of his rights because it was not properly authorized under applicable postal regulations. He further claims that to the extent the mail covers were in conformity with the postal regulations, the same were invalid both because they exceeded the postmaster's statutory authority to promulgate regulations and because they violated the Fourth Amendment reasonable expectation of privacy test enunciated by the Supreme Court in *Katz* v. *United States*, 389 U.S. 347 (1967). In suport of his *Katz* argument, Grimes relies upon the reasoning of the district court in *United States* v. *Choate*, 422 F. Supp. 261 (C.D. Ca. 1976) and that of Judge Hufstedler's partial dissent in the appeal of that case, *United States* v. *Choate*, 576 F. 2d 165 (9th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3317 (Nov. 7, 1978).

Upon a careful review, the court, while of the opinion that the majority view of the Ninth Circuit in *United States* v. *Choate, supra,* is the better reasoned, in all events finds that appellant has failed to demonstrate any prejudice to his

rights to a fair trial by reason of the activity complained of.

Grimes also claims that an expert improperly relied upon hearsay evidence as the basis for his expert opinion that a certain document relied upon by the defendant was falsely dated. In the opinion of the court it was permissible for the expert to have employed such underlying data as a basis for his expert opinion, that the evidence was properly admitted under Federal Rule of Evidence 703, 28 U.S.C. §703, and that the weight to be given to the expert's opinion was properly a matter for the jury.

During the course of the trial, the government called appellant's son as a witness and questioned him concerning whether the son, as owner of certain premises, had received any rental from his father (the appellant) for the portion of the premises which was used for appellant's law practice. The son's refusal to answer that question on the ground that it might tend to incriminate him was upheld by the trial court and the jury was instructed to disregard it. Nonetheless appellant claims prejudicial error which could not be cured by the precautionary instruction and which alone or in conjunction with the other errors alleged, would mandate a new trial. The trial court, while concerned, expressly held that the government's questions were put to the witness in good faith.

Upon review, we are of the opinion that the district judge did not abuse his discretion in refusing to grant a mistrial under the circumstances.

Upon a careful review of the entire record, the court is of the further opinion that none of the other assertions of error has merit. The trial of the defendant, which consumed approximately six weeks, was vigorously contested. Under such circumstances, the law guarantees the defendant a fair trial but not a perfect one. *Burton* v. *United States*, 391 U.S. 123, 135 (1968); *Lutwak* v. *United States*, 344 U.S. 604, 619 (1953).



In the opinion of the court, appellant was accorded a fair trial and no error intervened to deny him of any substantial right. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

(s) John A. Hehman
*Clerk*

**APPENDIX B**
**OPINION AND ORDER OF DISTRICT COURT**
**MEMORANDUM OPINION AND ORDER**

At a session of said court, held in the Federal Building, Flint, Michigan on October 10, 1978

PRESENT: Honorable James Harvey
*United States District Judge*

On July 19, 1978, defendant was convicted on two counts of willful evasion of income tax in violation of 26 USC 7201. The matter is before the Court on defendant's motions:

(1) for a new trial;

(2) for a judgment of acquittal notwithstanding the verdict of the jury; and

(3) to supplement or augment the record.

**MOTION FOR NEW TRIAL**

In his motion for new trial, defendant asserts that the Court committed various errors, which, considered cumulatively, would warrant a reversal of the convictions on appeal and would, accordingly, constitute grounds for the granting of a new trial.

All of the rulings which the defendant asserts were incorrect were carefully considered by the Court after having been fully argued by counsel. With regard to all but one of these rulings, defendant has advanced no argument not already having been advanced at trial. Having reviewed the record and the arguments of counsel, the Court believes that the rulings which the defendant contests were correct.

The Court, therefore, rejects that the defendant is entitled to a new trial on the basis that the rulings constituted reversible error.



The defendant also argues that he is entitled to a new trial on the basis of newly discovered evidence. In this connection, the Court notes that the defendant has furnished the Court with two letters, not introduced at trial, which the defendant asserts:

(1) demonstrate that the Court prejudicially erred by allowing the government's expert to refer to a letter from the BIC Corporation relating to the date "Lot #7" blue ink became available to the public;

(2) impeach the accuracy of the government ink expert's testimony which identified the ink used for the defendant's signature on an alleged loan agreement as "lot #7" blue ink, manufactured in the United States.

Basically, the additional letters reveal that prior to November 23, 1972, BIC blue ink was manufactured in Europe and raise the question whether Mr. Lyter, the government's ink expert, was able to differentiate between BIC blue ink manufactured in Europe and BIC blue ink manufactured in the United States. Significantly, the letters do not question the assertion that, assuming that the ink was properly identified as "lot #7" blue ink, the ink became available for use by the public in the early part of 1973.

In deciding whether to grant a motion for new trial on the basis of newly discovered evidence, the Courts have applied a four-part test. It must appear:

(1) that the evidence was newly discovered and was unknown to the defendant at the time of trial;

(2) that the evidence is material, not merely cumulative or impeaching;

(3) that it will probably produce an acquittal; and

(4) that the failure to learn of the evidence was due to no lack of diligence on the part of the defendant.

See *United States* v. *Hoffa*, 382 F2d 856 (CA 6, 1967); *United States* v. *Garner*, 529 F2d 962 (CA 6, 1976); *United States* v. *Young*, 426 F2d 93 (CA 6, 1970); 2 Wright, *Federal Practice and Procedure*, Section 557. In this regard, motions for a new trial on newly discovered evidence are not favored and should be granted only with great caution. *United States* v. *Hoffa*, supra, p. 862. Further, the Sixth Circuit has repeatedly held that the granting or refusing to grant such motions rests within the sound discretion of the District Court and its action must stand in the absence of a clear showing of abuse of discretion. *United States* v. *Hoffa*, supra, at 862.

The Court finds that the evidence proffered by the defendant is merely impeaching and, furthermore, would probably not produce an acquittal. In this connection, the Court notes that the letters submitted by the defendant merely impeach the accuracy of the identification of the ink by Mr. Lyter and do not, by contrast, show affirmatively that this identification was incorrect. Further, any questions raised by the letters are rebutted to a large extent by the counter-affidavit of Mr. Lyter.

Further, because the Court feels, despite the letters proffered by the defendant, that the identification of the ink in question, as "lot #7" BIC blue ink was amply supported by the evidence, the Court rejects that these letters demonstrate that it erred prejudicially by allowing Mr. Lyter to refer to a letter of the BIC Corporation indicating the dates of availability of said ink to be public.

For the foregoing reasons, the defendant's motion for new trial is DENIED.



**MOTION FOR JUDGMENT OF ACQUITTAL**

The Court, having reviewed the evidence, and having considered the arguments of counsel, feels that there is evidence on record, as to each element of the crimes charged in the indictment, that is, attempt to evade income taxes in violation of 26 USC 7201 for both 1971 and 1972, to support a verdict of guilty by the jury on both counts. Defendant's motion for judgment of acquittal is accordingly DENIED.

**MOTION TO SUPPLEMENT THE RECORD**

As the government points out, the letters submitted by the defendant in support of his motion for new trial automatically become part of the record. FR App P 10(a); Local Court Rule IX(e). See also 2 Wright, Federal Practice and Procedure, Section 557. Defendant's motion to supplement or augment the record is accordingly DENIED as unnecessary.

IT IS SO ORDERED.

(s) James Harvey
*United States District Judge*

## APPENDIX C
## TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS AND FEDERAL RULES

### FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### TITLE 39 USCA §101

**§101. Postal policy**

(a) The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people. The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities. The costs of establishing and maintaining the Postal Service shall not be apportioned to impair the overall value of such service to the people.

(b) The Postal Service shall provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining. No small post office shall be closed solely for operating at a deficit, it being the specific intent of the Congress that effective postal services be insured to residents of both urban and rural communities.



(c) As an employer, the Postal Service shall achieve and maintain compensation for its officers and employees comparable to the rates and types of compensation paid in the private sector of the economy of the United States. It shall place particular emphasis upon opportunities for career advancements of all officers and employees and the achievement of worthwhile and satisfying careers in the service of the United States.

(d) Postal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis.

(e) In determining all policies for postal services, the Postal Service shall give the highest consideration to the requirement for the most expeditious collection, transportation, and delivery of important letter mail.

(f) In selecting modes of transportation, the Postal Service shall give highest consideration to the prompt and economical delivery of all mail and shall make a fair and equitable distribution of mail business to carriers providing similar modes of transportation services to the Postal Service. Modern methods of transporting mail by containerization and programs designed to achieve overnight transportation to the destination of important letter mail to all parts of the Nation shall be a primary goal of postal operations.

(g) In planning and building new postal facilities, the Postal Service shall emphasize the need for facilities and equipment designed to create desirable working conditions for its officers and employees, a maximum degree of convenience for efficient postal services, proper access to existing and future air and surface transportation facilities, and control of costs to the Postal Service.

### TITLE 39 USCA §401

**§401. General powers of the Postal Service**

The Postal Service shall have the following general powers:

(1) to sue and be sued in its official name:

(2) to adopt. amend. and repeal such rules and regulations as it deems necessary to accomplish the objectives of this title:

(3) to enter into and perform contracts. execute instruments. and determine the character of. and necessity for. its expenditures:

(4) to determine and keep its own system of accounts and the forms and contents of its contracts and other business documents. except as otherwise provided in this title:

(5) to acquire. in any lawful manner. such personal or real property. or any interest therein. as it deems necessary or convenient in the transaction of its business: to hold. maintain. sell. lease. or otherwise dispose of such property or any interest therein: and to provide services in connection therewith and charges therefor:

(6) to construct. operate. lease. and maintain buildings. facilities. equipment. and other improvements on any property owned or controlled by it. including. without limitation. any property or interest therein transferred to it under section 2002 of this title:

(7) to accept gifts or donations of services or property. real or personal. as it deems. necessary or convenient in the transaction of its business:

(8) to settle and compromise claims by or against it;

(9) to exercise. in the name of the United States. the right of eminent domain for the furtherance of its official purposes: and to have the priority of the United States with respect to the payment of debts out of bankrupt. insolvent. and decendents' estates: and

(10) to have all other powers incidental. necessary.



or appropriate to the carrying on of its functions or the exercise of its specific powers.

**TITLE 39 USCA §402**

Except for those powers, duties, or obligations specifically vested in the Governors, as distinguished from the Board of Governors, the Board may delegate the authority vested in it to the Postmaster General under such terms, conditions, and limitations, including the power of redelegation, as it deems desirable. The Board may establish such committees of the Board, and delegate such powers to any committee, as the Board determines appropriate to carry out its functions and duties. Delegations to the Postmaster General or committees shall be consistent with other provisions of this title, shall not relieve the Board of full responsibility for the carrying out of its duties and functions, and shall be revocable by the Governors in their exclusive judgment.

**TITLE 39 USCA §403**

(a) The Postal Service shall plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees. Except as provided in the Canal Zone Code, the Postal Service shall receive, transmit, and deliver throughout the United States, its territories and possessions, and, pursuant to arrangements entered into under sections 406 and 411 of this title, throughout the world, written and printed matter, parcels, and like materials and provide such other services incidental thereto as it finds appropriate to its functions and in the public interest. The Postal Service shall serve as nearly as practicable the entire population of the United States.

(b) It shall be the responsibility of the Postal Service—

(1) to maintain an efficient system of collection, sorting, and delivery of the mail nationwide;

(2) to provide types of mail service to meet the needs of different categories of mail and mail users; and

(3) to establish and maintain postal facilities of such character and in such locations that postal patrons throughout the Nation will, consistent with reasonable economies of postal operations, have ready access to essential postal services.

(c) In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.

**TITLE 39 USCA §404**

**§404. Specific powers**

(a) Without limitation of the generality of its powers, the Postal Service shall have the following specific powers, among others:

(1) to provide for the collection, handling, transportation, delivery, forwarding, returning, and holding of mail, and for the disposition of undeliverable mail;

(2) to prescribe, in accordance with this title, the amount of postage and the manner in which it is to be paid;

(3) to determine the need for post offices, postal and training facilities and equipment, and to provide such offices, facilities, and equipment as it determines are needed;

(4) to provide and sell postage stamps and other stamped paper, cards, and envelopes and to provide such other evidences of payment of postage and fees as may be necessary or desirable;

(5) to provide philatelic services;

(6) to provide, establish, change, or abolish special nonpostal or similar services;



(7) to investigate postal offenses and civil matters relating to the Postal Service;

(8) to offer and pay rewards for information and services in connection with violations of the postal laws, and, unless a different disposal is expressly prescribed, to pay one-half of all penalties and forfeitures imposed for violations of law affecting the Postal Service, its revenues, or property, to the person informing for the same, and to pay the other one-half into the Postal Service Fund; and

(9) to authorize the issuance of a substitute check for a lost, stolen, or destroyed check of the Postal Service.

(b)(1) The Postal Service, prior to making a determination under subsection (a)(3) of this section as to the necessity for the closing or consolidation of any post office, shall provide adequate notice of its intention to close or consolidate such post office at least 60 days prior to the proposed date of such closing or consolidation to persons served by such post office to ensure that such persons will have an opportunity to present their views.

(2) The Postal Service, in making a determination whether or not to close or consolidate a post office, shall consider—

(A) the effect of such closing or consolidation on the community served by such post office;

(B) the effect of such closing or consolidation on employees of the Postal Service employed at such office;

(C) whether such closing or consolidation is consistent with the policy of the Government, as stated in section 101(b) of this title, that the Postal Service shall provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining;

(D) the economic savings to the Postal Service resulting from such closing or consolidation; and

(E) such other factors as the Postal Service determines are necessary.

(3) Any determination of the Postal Service to close or consolidate a post office shall be in writing and shall include the findings of the Postal Service with respect to the considerations required to be made under paragraph (2) of this subsection. Such determination and finding shall be made available to persons served by such post office.

(4) The Postal Service shall take no action to close or consolidate a post office until 60 days after its written determination is made available to persons served by such post office.

(5) A determination of the Postal Service to close or consolidate any post office may be appealed by any person served by such office to the Postal Rate Commission within 30 days after such determination is made available to such person under paragraph (3). The Commission shall review such determination on the basis of the record before the Postal Service in the making of such determination. The Commission shall make a determination based upon such review no later than 120 days after receiving any appeal under this paragraph. The Commission shall set aside any determination, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;

(B) without observance of procedure required by law; or

(C) unsupported by substantial evidence on the record.

The Commission may affirm the determination of the Postal Service or order that the entire matter be returned for further



consideration, but the Commission may not modify the determination of the Postal Service. The Commission may suspend the effectiveness of the determination of the Postal Service until the final disposition of the appeal. The provisions of section 556, section 557, and chapter 7 of title 5 shall not apply to any review carried out by the Commission under this paragraph.

**233.2 MAIL COVERS**

**39 CFR 233.2**

**.21 POLICY**

The U.S. Postal Service maintains rigid controls and supervision with respect to the use of mail covers as investigative or law enforcement techniques.

**.22 SCOPE**

These regulations constitute the sole authority and procedure for initiating, processing, placing, and using mail covers.

**.23 DEFINITIONS**

For purposes of these regulations, the following terms are hereby defined:

a. *Mail cover* is the process by which a record is made of any data appearing on the outside cover of any class of mail matter, including checking the contents of any second-, third- or fourth-class mail matter as now sanctioned by law, in order to obtain information in the interest of (1) protecting the national security, (2) locating a fugitive, or (3) obtaining evidence of commission or attempted commission of a crime.

b. *Fugutive* is any person who has fled from the United States or any State, Territory, the District of Columbia or possession of the United States, to

avoid prosecution for a crime, to avoid punishment for a crime, or to avoid giving testimony in a criminal proceeding.

c. *Crime*, for purposes of these regulations, is any commission of an act or the attempted commission of an act that is punishable by law by imprisonment for a term exceeding 1 year.

d. *Law enforcement agency* is any authority of the Federal Government or any authority of a State or local government one of whose functions is to investigate the commission or attempted commission of acts constituting a crime.

**.24 AUTHORIZATIONS—CHIEF POSTAL INSPECTOR**

**.241** The Chief Postal Inspector is the principal officer of the Postal Service in the administration of all matters governing mail covers. He may delegate any or all authority in this regard to not more than two designees at Inspection Service Headquarters. Except for national security covers, he may also delegate any or all authority to the regional chief postal inspectors. All such delegations of authority shall be issued through official directives.

**.242** The Chief Postal Inspector, or his designee, may order mail covers under the following circumstances:

a. When he has reason to believe the subject or subjects of the mail cover are engaged in any activity violative of any postal statute.

b. When written request is received from any law enforcement agency wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover is necessary to (1) protect the national security, (2) locate a fugitive, or (3) obtain information regarding the commission or attempted commission of a crime.



c. Where time is of the essence, the Chief Postal Inspector, or his designee, may act upon an oral request to be confirmed by the requesting authority in writing within 2 business days. However, no information shall be released until an appropriate written request is received.

**.25 POSTAL INSPECTORS IN CHARGE**

**.251** All postal inspectors in charge, and not more than three designees pursuant to delegations in writing, may order mail covers within their districts under the following circumstances:

a. Where he has reason to believe the subject or subjects are engaged in an activity violative of any postal statute.

b. Where written request is received from any law enforcement agency of the Federal, State, or local governments, wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover would aid in the location of a fugitive, or that it would assist in obtaining information concerning the commission or attempted commission of a crime.

**.252** Except where mail covers are ordered by the Chief Postal Inspector, or his designee, requests for mail covers must be approved by the postal inspector in charge, or his designee, in each district in which the mail cover is to operate.

**.253** Where time is of the essence, the postal inspector in charge, or his designee, may act upon an oral request to be confirmed by the requesting authority in writing within 2 business days. However, no information shall be released until an appropriate written order is received.

**.26 LIMITATIONS**

**.261** No persons in the Postal Service, except those

employed for that purpose in dead-mail offices, may break or permit breaking of the seal of any matter mailed as first-class mail without a search warrant, even though it may contain criminal or otherwise unmailable matter, or furnish evidence of the commission of a crime.

**.262** No mail covers shall include matter mailed between the mail cover subject and his known attorney-at-law.

**.263** No officer or employee of the Postal Service other than the Chief Postal Inspector, or postal inspectors in charge, and their designees, are authorized to order mail covers. Under no circumstances shall a postmaster or postal employee furnish information as defined in 233.23 to any person except as authorized by the Chief Postal Inspector, a postal inspector in charge, or their designees.

**.264** Excepting mail covers ordered upon subjects engaged, or suspected to be engaged, in any activity against the national security, or activity violative of any postal law, no mail cover order shall remain in force and effect for more than 30 days. At the expiration of such period, or prior thereto, the requesting authority may be granted additional 30-day periods under the same conditions and procedures applicable to the original request.

**.265** No mail cover shall remain in force longer than 120 days unless personally approved for further extension by the Chief Postal Inspector.

**.266** Excepting fugitive cases, no mail cover shall remain in force when the subject has been indicted for any cause. If the subject is under investigation for further criminal violations, a new mail cover order must be requested consistent with these regulations.

**.27 RECORDS**

**.271** All requests for mail covers, with records of action ordered thereon, and all reports issued pursuant thereto, shall be deemed within the custody of the Chief Postal



Inspector. However, the physical housing of this data shall be at the discretion of the Chief Postal Inspector.

**.272** The postal inspectors in charge shall promptly submit copies of all requests for mail covers and the determination made thereon to the Chief Postal Inspector, or to his designee, for review.

**.273** If the Chief Postal Inspector, or his designee, determines a mail cover was improperly ordered by a postal inspector in charge or his designee, all data acquired while the cover was in force shall be destroyed, and the requesting authority notified of the discontinuance of the mail cover and the reasons therefor.

**.274** Any data concerning mail covers shall be made available to any mail cover subject in any legal proceeding through appropriate discovery procedures.

**.275** The retention period for files and records pertaining to mail covers shall be 8 years.

**.28 REPORTING TO REQUESTING AUTHORITY**

Once a mail cover has been duly ordered, authorization may be delegated to any officer in the Postal Service to transmit mail cover reports directly to the requesting authority. Where at all possible, the transmitting officer should be a postal inspector.

**.29 REVIEW**

**.291** The Chief Postal Inspector, or his designee, shall review all actions taken by postal inspectors in charge or their designees upon initial submission of a report on a request for mail cover.

**.292** The Chief Postal Inspector's determination in all matters concerning mail covers shall be final and conclusive and not subject to further administrative review.

**RULE 703 OF THE FEDERAL RULES OF EVIDENCE**
**Bases of Opinion Testimony by Experts**

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

**RULE 801 OF THE FEDERAL RULES OF EVIDENCE**
**Definitions**

The following definitions apply under this article:

**(a) Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

**(b) Declarant.** A "declarant" is a person who makes a statement.

**(c) Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

**(d) Statements which are not hearsay.** A statement is not hearsay if--

**(1) Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or

**(2) Admission by party-opponent.** The statement is offered against a party and is (A) his own statement, in



either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

(214)

## APPENDIX D
## CROSS EXAMINATION OF SPECIAL AGENT GEORGEFF ON SEPARATE RECORD

CRAIG G. GEORGEFF

having been previously sworn, resumed the stand and testified as follows:

CROSS-EXAMINATION

BY MR. SEGAR:

Q. Mr. Georgeff, when did you begin investigating Mr. Moody?

A. I would say early 1974 and the investigation was a combination investigation. It involved a number of enterprises exclusive of Mr. Moody.

Q. Did you discuss the question of the investigation with Mr. Moody?

A. The question of which investigation?

Q. Did you talk to Mr. Moody during your investigation?

A. Several times.

Q. Did you make inquiry as to his net worth?

A. Definitely.

Q. Did he discuss his net worth with you?

A. Yes.

Q. Did you ask him about the loans that he had outstanding?

A. Yes.

Q. Did he reveal to you loans from Mr. Grimes?

A. Yes.

Q. Did he state to you that he ever received this amount of (215) loans in 1970 from Mr. Grimes that the affidavit refers to?

A. He confirmed the affidavit, the same facts.

Q. Did he state those were the only loans?

A. I believe he did.

Q. He stated that to you verbally to you, did he not?



A. Yes, in addition to the affidavit.

Q. And did you talk to other people to find out whether or not you could confirm that fact or whether or not it was false?

A. I talked to numerous people.

Q. Did you ask them about the loans that Mr. — they knew about that Mr. Moody had made from Mr. Grimes?

A. You want to know if I asked people if they knew about the loans from Mr. Grimes? I tried to obtain documents or corroboration that such existed and I could come up with none other than these which are in the affidavit.

Q. Did people that you talked to tell you they didn't know about any other loans?

A. I talked — I reviewed that record. I could find nothing as to these additional amounts.

Q. When you — I understand when you talked to them you asked about the loans?

A. In addition to these others.

Q. They told you that they didn't know of any other loans, is that right?

A. Well, I don't know I asked anybody if there were any loans (216) because I was searching out information that would be indicative of loans.

Q. What would a banker have to do with any knowledge of loans between Mr. Moody and Mr. Grimes?

A. He wouldn't. I asked to look at the various records of Mr. Moody to see if monies were deposited into his account. That's the way the investigation was conducted. I did not go to the bank or to the Registrar of Deed or to the County Clerk to see whether there were any loans between Moody and Grimes.

Q. Did you talk to any banker or Registrar of Deeds or any public organization? Did you talk to anybody about whether or not Mr. Moody — about loans that Mr. Moody had outstanding?

A. I believe I talked to his wife.

*Cross Examination of Special Agent Georgeff on Separate Record*

Q. And did you ask her about outstanding loans to Mr. Moody?

A. I really can't recall. I don't know if I talked to her about the loans or not.

Q. But Mr. Moody did tell you verbally he had no other loans beside the little one we are talking about here?

A. Verbally and through the documents, yes.

Q. You only asked him about 1970, didn't you?

A. No.

Q. Even though the affidavit was directed to 1970?

A. No, sir. In fact, the investigation started with the year '69. I viewed all years, '69 through '70. I would have (217) surely asked him for that much.

Q. I take it you have a complete file somewhere that is a complete file on the investigation of Mr. Moody?

A. Somewhere there probably is, yes, sir.

Q. In that file would your written memo about your discussion with him, would that be in there?

A. Some of it may be. All of this, much of the material was returned to the State of Michigan. They did a cooperative investigation and it consisted of two stack of files six foot high and two foot wide. I am sure there is information in there somewhere.

Q. You probably didn't make a memorandum of your conversation?

A. Yes, I did make a memorandum of the official interview and the letter.

Q. And summaries, I am sure, in writing of your findings at the various banks?

A. It was a discontinued report and so basically what I would have done is stated my reason for getting out of the case. Under the computation as to net worth, it would be, it would set forth the reason I left the investigation or withdrew from it and that would be in the computation and such things as the mention of banks or anybody I contacted would be minimal in number.

Q. What bank account did you look at?



*Cross Examination of Special Agent Georgeff on Separate Record*

A. Much of the information came from Mr. Moody. I mean, I think — (218) I believe his wife had an account — I am thinking of the Citizens Bank, I am not sure.

MR. FORREST: Before we go any further with this could we have further clarification as to what this is all about? I don't quite understand how it bears on Mr. Georgeff's proposed testimony.

THE COURT: Mr. Segar?

MR. SEGAR: Well, I think it bears — I think it is important. At least I want to make a record where he got the information that he is going to testify to, how he got the information. I think that is relevant.

THE COURT: All right.

Q. You said that you had Mr. Moody's bank account.

A. Mr. Moody disclosed most everything. He supplied me with a letter which I read or which I viewed and returned to him and offhand I can't recall the bank, although Citizens, for some reason, does ring a bell and at one time the account 840306. That may be Mr. Grimes' account at the National Bank. It comes into light. I don't know what that connotation is. Mr. Moody indicated to that's where the $6,500 check came from from Mr. Grimes which he had initially loaned him as the first portion in 1970. That was followed by, supported by the Deed at the Genesee County Court House. I think 65, that was a month or 15 days, maybe long after the initial interview—

(219)

Q. Did you talk to Mr. Jeffers?

A. Mr. Jeffers was already dead.

Q. At that time?

A. He died, I believe, in March of '72, maybe April of '72.

Q. Mr. Georgeff, did you also take part of—

A. Mr. Moody and Mr. Jeffers are both dead.

MR. SEGAR: Well, your Honor, I think that is the extent of the questions that I wish to ask.

*Cross Examination of Special Agent Georgeff*
*on Separate Record*

In view of the Court's ruling and Mr. Georgeff's testimony, I would like to make a request that he provide for us his criminal investigation of Mr. Moody.

THE COURT: The Court doesn't know why that would be necessary, not just off hand, Mr. Segar. As I understand it, this witness is going to testify:

No. 1, he got the affidavit from Mr. Moody which is Exhibit 65-A, and:

No. 2, that at that time Mr. Moody furnished no additional evidence of loans and that is the nonverbal act that we are talking about and the question is whether it is hearsay and it is not hearsay as far as the Court is concerned. The Court sees no reason why you want to delve into another investigation.

MR. SEGAR: Well, with all due deference to the Court, my understanding is that his testimony is that it was not a nonverbal act; it was a very, very verbal act (220) of Mr. Moody, an assertion that there were no other loans.

MR. FORREST: That is, your Honor, we are not going to ask that question. That is not the question that is going to be asked.

THE COURT: Well, the Court—what was left with the Court before we recessed for the luncheon hour concerned simply a nonverbal assertion as to whether or not Mr. Moody furnished any additional evidence of loans and that is basically what is before the Court and that is the Court's understanding that that is going to be asked and—

MR. SEGAR: But, your Honor, by calling an apple an orange you can't make it an orange. Mr. Georgeff has relied, obviously relied upon the statement to him of Mr. Moody. He did say he found no evidence of those loans. It is clear from the interview whether he asked Mr. Moody during those years—

THE COURT: He is testifying—all things granted—if he testified that that is all he got—if that is what you have asked him, then you have got clear hearsay. There is no question about it is his so-called knowledge, we have clear hearsay.



*Cross Examination of Special Agent Georgeff*
*on Separate Record*

But, what the Court is saying that he was about to testify to this morning in the Court's opinion is not hearsay as far as the Federal Rules of Evidence are concerned, as far as the Committee comments of the Federal Rules of Evidence which promulgated them is (221) concerned is not hearsay and the Court is about to permit that statement to come in, rightfully or wrongly.

All right. Are we ready to proceed?

MR. FORREST: Yes, your Honor.

MR. SEGAR: Yes, your Honor.

THE COURT: Bring in the jury.

MR. SEGAR: For the record, I would object when the question is asked unless the Court instructs me not to.

(172)

**APPENDIX E**
**RE-CROSS EXAMINATION OF GOVERNMENT WITNESS ALBERT LYTER**

RE-CROSS EXAMINATION

BY MR. SEGAR:

Q. Mr. Lyter, you have no knowledge of that yourself except from what you got from a letter which somebody has sent to you which is here in the Courtroom, isn't that right?

A. That is correct.

(173)

MR. SEGAR: No further questions.

MR. HAVILAND: I would like to ask one additional question.



**STATEMENT**

On July 18, 1978, following a jury trial in the United States District Court for the Eastern District of Michigan (Southern Division), Petitioner was convicted on two counts of tax evasion for the years 1971 and 1972, in violation of Section 7201 of the Internal Revenue Code of 1954 (26 U.S.C.). He was sentenced on September 19, 1978, to two concurrent terms of 30 days' imprisonment and fined $5,000 on each of the two counts. On October 10, 1978, the District Court entered an order denying appellant's motion for a new trial; and on June 21, 1979, the Court of Appeals for the Sixth Circuit affirmed his convictions.

Appellant is an attorney who, except for military service during World War II and the Korean War, has been engaged in the practice of law in Flint, Michigan, since his graduation from the University of Michigan Law School in 1949. He is a sole practitioner with a general practice consisting primarily of negligence and personal injury actions, probate, and domestic relations work. (Tr. 1745)

After an investigation lasting several years subsequent to an indictment, the Government presented evidence at trial which demonstrated a substantial increase in the net worth of Petitioner during the years 1971 and 1972; and claimed that such increase plus personal expenditures indicated a significant understatement of taxable income in Petitioner's federal tax returns for those two years.

Petitioner's defense was that any increase in net worth and expenditures and unreported income was explainable through clerical error, deductions taken erroneously but in good faith by Petitioner, and from non-taxable receipts—mainly loans and loan repayments to him.

During the course of the investigation, the Government twice placed a so-called "mail cover" on Petitioner's home and business addresses. This procedure was carried out by

the Postal Service at the request of the Special Internal Revenue Agent investigating the case. Petitioner unsuccessfully attacked the validity of the mail cover procedure both by motion to suppress at trial and on appeal.

One of the deductions claimed by Petitioner on his tax returns for the years in question and claimed by the Government to be invalid was for rent paid to Petitioner's children for his office building. Petitioner had purchased the building some years before and entered into a lease arrangement with his children (including the trustee of a trust for one of his children). The Government attacked both the bona fides of the transaction, as well as the amount of the deduction. Prior to trial the special agent spoke to Fred Grimes, the oldest son of Petitioner on two occasions. The second time the son was represented by counsel and a tape was made of the interview. At that time Fred Grimes pled his privilege against self-incrimination to a majority of the questions asked and specifically to the question of whether or not he had received any rent payments from his father.

At the trial, Government counsel put exactly the same question to Petitioner's son, who was represented by separate counsel in the court room. He once again asserted his Fifth Amendment rights. (Tr. 808) Immediatly thereafter Petitioner's counsel requested a mistrial on the ground that Government counsel should never have asked a question of one so closely associated with the Defendant knowing that in all likelihood he would plead the Fifth Amendment. (Tr. 811) The motion was denied and the trial judge's ruling was affirmed on appeal.

Another area of controversy involved an amount received by Petitioner from his clients Mr. and Mrs. Ronald Worth. This amount was received at the time of the settlement of the first portion of an accident case involving another non-settling Defendant. Petitioner treated the amount received as an advance against future costs and a loan as a result of an agreement between he and the clients. The Government claimed no such agreement existed.



Petitioner had a typed and executed document to substantiate the transaction, which the Government claimed was false. In order to attempt to prove its contention, the Government subpoenaed the original document from Petitioner, over his objection, for the purpose of having the ink tested. The test results indicated that the ink on all of the signatures on the document, except that of Petitioner, was available at the time the document was dated, namely in 1972. However, the Government expert, Albert Lyter, testified that he identified the ink used in making Petitioner's signature as being from the Bic Company and that it was not available until a few months after the date of the document.

Mr. Lyter's expertise was in ink analysis, but he had no knowledge of when the ink first became available, except through a letter written to him about another case some years earlier from a representative of the Bic Company. (Tr. 1148-49, App. ) The trial judge, after first admitting the letter in evidence over Petitioner's objection, reversed himself and withdrew the letter from the jury, but stated that Mr. Lyter could refer to it as a basis of his testimony. (Tr. 1157-8) Petitioner unsuccessfully objected to this procedure, stating that the letter constituted inadmissible hearsay.

In making its net worth computation, the Government acknowledged that Petitioner, during the year 1970, had loaned one Connie Moody (who was deceased at the time of trial) the approximate amount of $28,000. It obtained this information through an affidavit signed by Petitioner which had been transmitted to Moody at his request during an investigation of Moody's tax affairs some years earlier. The affidavit was admitted in evidence by consent. (Gov. Ex. 65A) At the trial, Petitioner testified that, in fact, at the beginning of the relevant period, there were loans due to him from Moody and a related party in the approximate amount of $55,000 to $60,000, which would have accounted for approximately $30,000 of the difference in net worth claimed by the Government. (Tr. 1796-97)

On rebuttal, over strenuous objection by Petitioner, the special agent, who had investigated Moody as well as Petitioner, was allowed to testify about his earlier criminal investigation of Moody, and, further, that he had found no evidence of any additional loans other than those conceded by the Government as listed in Petitioner's affidavit and which related only to the year 1970. (Tr. 2314) Petitioner strongly objected that the testimony of the special agent had to be based on inadmissible hearsay. The trial judge overruled the objection and, further, refused Petitioner's request to see the written portions of the investigation remaining with the special agent. (See App. )

The trial, which lasted approximately six weeks, was submitted to the jury July 17, 1978, and a verdict of guilty was returned July 18, 1978. The Court of Appeals for the Sixth Circuit affirmed Petitioner's convictions in an opinion filed June 21, 1979, seven days after oral argument on June 14, 1979.



## REASONS FOR GRANTING THE WRIT

This case presents serious questions the resolutions of which will have wide application throughout the country. Perhaps the most significant issue of this appeal involves the validity of the mail cover procedure which is being utilized throughout the country by various governmental law enforcement agencies to obtain evidence or gain information about United States citizens.

To the best of Petitioner's knowledge, no federal court in this country, save the Court of Appeals for the Sixth Circuit in this case, has upheld the mail-cover procedure against the specific contention that Postal Regulations providing for it are not within the rule-making power of the Postal Service.

There is no specific statutory basis for use of the mail cover. The sole authority for this procedure is the Postal Regulation contained in 39 CFR §233.2.* (See App. ) The only possible legislative source of authority for such a procedure is found in 39 USCA §401(2), which gives the Postal Service the power to make rules and regulations "as it deems necessary to accomplish the objectives of this title".** Petitioner does not believe that the mail-cover procedure, implemented solely to help other law enforcement agencies in matters unrelated to postal offenses can possibly be deemed to be included within such a power. The question here is not whether Congress could have authorized such a procedure but whether, in fact, it has.

A regulatory agency has no power to exceed its statutory authority. It cannot deviate from or go beyond the mandate of Congress. See in this regard *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 US 726, 745 (1973) where this Court stated:

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*See statement of the general counsel of the Post Office to this effect as quoted in *United States* v. *Choate*, 576 F2d 165 at (1976)

** e.g. see 39 USCA §§101, 401-404

"But the commission contends that since it is charged with administration of the statutory scheme, its construction of the statute over an extended period should be given great weight. See, e.g., *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944). This proposition may, as a general matter, be conceded, although it must be tempered with *the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate.*

* * *

'The construction put on a statute by an agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed it it has a 'reasonable basis in law.' . . .But the Courts are the final authorities on issues of 746 statutory construction, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385, 85 S.Ct. 1035, 1042, 13 L. Ed. 2d and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' " (Emph. add.)

Experience has shown that through use of this procedure the Government can within a fairly short period make up an extremely accurate profile of a person's life style and his friends and acquaintances, as well as his business relationships. Citizens should not be subjected to such surveillance without the clear intention of Congress that it is admissible.

Further, this Court has never expressly dealt with the constitutionality of the mail-cover procedure. Although several lower courts have found the procedure to be valid, there remain serious questions as to whether their decisions are correct. In a recent decision *, later reversed, serious

*U.S. v *Choate*, 422 F Supp 261 (Cal, 1976)



constitutional deficiencies were found in the procedure. The concerns in this area were very well and thoughtfully set forth by Judge Hufstedler in her dissenting opinion in the Ninth Circuit decision of *United States* v. *Choate*, 576 F.2d 165 (1976) cert. denied, 99 S.Ct. 350 (Nov. 7, 1978). As she noted, people using the United States Government Mail, both senders and recipients, have a reasonable expectation of privacy with respect to the material on the outside of the envelope. The disclosure that is voluntarily made by transmission of a letter is for a limited purpose and, of course, no disclosure is made at all by the intended recipient. It is critical to remember that in this situation we are dealing with what is for most purposes a government monopoly and that people have little choice about whether or not to use the facilities of the United States Postal Service. Obviously, in this case, as in the many other instances where a mail cover has been used, no warrant was obtained and the question of reasonableness of the search was never adjudicated. This Court should review the legitimacy of the systematic intrusion by the use of mail covers into the lives of the citizens of this country.

In addition, this case raises significant questions involving interpretation of the hearsay provisions of the Federal Rules of Evidence. The amount of the loans made by Petitioner to Connie Moody were critical to his defense in explaining the increase in his net worth. The rebuttal testimony of the special agent confronted Petitioner with a situation where statements of a decedent (e.g. Moody had died some time before the trial), other persons and written documents, were used to contradict him without the availability of cross examination and where even the production of the notes of the special agent concerning his investigation was refused.

The decision of the Sixth Circuit in this case upholding the introduction of such evidence is in direct conflict with that of the Fifth Circuit in *U.S.* v. *Brown*, 548 F2d 1194 (C.A. Fla., 1977).

In the *Brown* case an Internal Revenue agent testified that between ninety and ninety-five percent of the returns prepared by the defendant tax preparer, which the agent had audited, contained substantially overstated itemized deductions. She also acknowledged that she had not talked to the people who made the returns. The Court ruled the admission of such testimony erroneous because, in effect, she was relying for a statement of fact on out of court statements (e.g. her interviews with the taxpayers whose returns she had audited) which were not matters of her own personal knowledge and which were not available to the defendant for cross examination.

In this case a separate record was made and the special agent acknowledged that in his investigation he had talked to Mr. Moody who stated that he had borrowed no additional monies from Petitioner; and that he also talked to other people and had reviewed a number of written documents. (See App. ) The separate record made clear that his actual testimony before the jury that his investigation had revealed no additional loans from Petitioner to Moody was based on hearsay evidence. (Tr. 2314) Petitioner was obviously unable to refute this in any way. This ruling of the trial court which was affirmed on appeal and which Petitioner believes is in conflict with the *Brown* case, involves a serious question of the interpretation of the Federal Rules of Evidence.

Similarly, the trial court allowed into evidence the testimony of a representative of the Bic Company, who was not present in court, through a letter he had written some years earlier to the Government's expert witness, Albert Lyter. The trial and appellate courts justified this on the basis of Federal Rule of Evidence 703 which allows an expert to rely on items not admissible in evidence in forming his opinion, if it is of the type reasonably relied upon by experts in the particular field.

In this case, however, it is clear that Mr. Lyter, the expert witness, had no opinion whatsoever on when the ink



first became available. (Tr. 1148-49, App. ) He was nothing more than a conduit for a plain statement of fact made by Mr. Coppeta of the Bic Company about a matter concerning which Mr. Lyter had no personal knowledge. Petitioner does not believe, despite the obvious intention to broaden the rules of evidence with respect to admissibility, that it was ever the intention of the drafters of the Federal Rules of Evidence to allow admission of such a statement. (See *Bryan* v. *John Bean Division of FMC Corp.*, 566 F.2d 541 (C.A. 5, 1978)) The situation is clearly distinguishable from the sort of situation in which a doctor might rely on nurses' notes to form a medical opinion. In fact, far from being an underlying basis for Mr. Lyter's opinion, Mr. Lyter's identification of the ink was really preliminary to the conclusion of when the ink was first available.

Petitioner believes that guidance should be given by this Court to the many federal trial courts in this country with respect to this very important aspect of Rules of Evidence, their interpretation and application.

Finally, the conduct of Government counsel in asking Petitioner's son, Fred Grimes, a question, knowing full well that he would in all likelihood plead the Fifth Amendment (since he had already done so in a prior taped interview), should not be countenanced. (Tr. 808, et seq) Petitioner believes this case is distinguishable from *Namet* v. *United States*, 373 U.S. 179 (1963) relied upon by the Government. In the latter case two of the witnesses involved had already pled guilty (they were co-defendants); and it was quite doubtful as to whether or not they could plead the Fifth Amendment. Further, in *Namet* the court relied on the failure of defense counsel to object to many of the questions involved.

Nevertheless, to the extent that the *Namet* decision would justify the trial court's ruling in this case, Petitioner believes it should be re-examined, because it is critical that the people of this country know that its Government acts

fairly in carrying out its various functions and particularly those involving the enforcement of the criminal laws. There is simply no reason why Government counsel should not have cleared this matter up before the Court while the jury was excused in order to avoid the kind of prejudice that could have easily and probably did occur here. This problem is one which occurs often and should be put to rest. See, for example, *Lawrence* v. *Wainwright*, 445 F2d 281 (5th Cir., 1971; *United States* v. *Ritz*, 548 F2d 510 (5th Cir., 1977); *San Fratello* v. *United States*, 340 F2d 560 (5th Cir., 1965); *United States* v. *King*, 461 F2d 53 (8th Cir., 1972), and *United States* v. *Maloney*, 262 F2d 535 (2nd Cir., 1959).



## CONCLUSION

Petitioner believes that the case involves timely and substantial questions of great public importance and further, that the decisions of the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Eastern District of Michigan, Southern Division, should be reversed for the reasons already stated herein.

Respectfully submitted:

LEITSON, DEAN, DEAN, SEGAR & HART, P.C.
*Attorney for Petitioner*

By: Robert L. Segar